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In The Supreme Court Of The United States

October Term, 1969

No. 39

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

APPELLEES' BRIEF ON THE MERITS

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FOR THE DISTRICT OF COLORADO

APPELLEES' BRIEF ON THE MERITS

QUESTIONS PRESENTED

1. Whether this appeal is moot, thereby requiring outright dismissal, since there is now no actual controversy involving

real and substantial rights between the parties hereto.

2. Whether the two-month voting residence requirement of C.R.S. (1963), 49-24-1, as amended, is so unreasonable as to amount to a prohibited discrimination under the Equal Protection Clause of the Fourteenth Amendment.

3. Whether the two-month residence requirement of C.R.S. (1963), 49-24-1, as amended, is an unconstitutional infringement upon Appellants' "right to travel", with particular emphasis upon the Privileges and Immunities Clause of the Fourteenth Amendment.

STATEMENT

This Appeal presents the issue as to the constitutionality of the Colorado State residence requirement, C.R.S. (1963), 49-24-1, as amended, in United States Presidential and Vice-Presidential elections.

On October 4, 1968, the Appellants filed their Complaint in the District Court of the United States for the District of Colorado, alleging: That they were citizens of the United States and residents of the State of Colorado since June 15, 1968, having moved from the State of California; That they were desirous of voting in the November 5,

1968, Presidential and Vice-Presidential election; That they were refused permit to register as voters in the State of Colorado, despite their repeated efforts to do so, because they were unable to comply with the State's six-month residency requirement; That because they were no longer California residents, that State also refused them permit to register to vote; That they were otherwise qualified voters; That the Colorado six-month residency requirement was unreasonable and unconstitutional; That they were suing in behalf of themselves and all other citizens similarly situated to (1) compel Appellees, as election officials, to register them; (2) to enjoin the enforcement of the six-month residency requirement; or, in the alternative, (3) conditional registration pending court determination of the issue.

On October 30, 1968, by order, the District Court of the United States for the District of Colorado dismissed their Complaint. This was supplemented by a memorandum opinion dated November 29, 1968, Hall v. Beals, 292 F.Supp. 610 (D.C. Colo. 1968). Appellants are appealing from that decision.

SUMMARY OF ARGUMENT

The decision below is in accordance with the law. Drueding v. Devlin, 234 F. Supp. 721 (D.Md., 1964) aptly stated the law, and that decision was affirmed

per curiam by this Court at 380 U.S. 125 (1965). Drueding, Id., remains the law as there has been nothing subsequent to mollify its impact. Save for the names, dates, places, and length of residency requirements, the facts in the two cases are identical. The Court in Drueding, Id., concluded that the voting residency requirement of one year in Maryland was not so unreasonable as to amount to an irrational or unreasonable discrimination, and the Complaint was therefore dismissed. A fortiori, therefore, since the Colorado residency requirement, at issue, is only two months, the Colorado statute is certainly reasonable as measured by the Equal Protection Clause.

Appellees' position is that:

1. There is now no actual controversy involving real and substantial rights between the parties hereto, and the appeal should, therefore, be dismissed outright.

2. The constitutionality of the old six-month residency requirement is not in issue because it has been amended to two months.

3. The two-month residency requirement of Colorado Revised Statutes 1963, Section 49-24-1, as amended, is neither in violation of the Equal Protection Clause nor the Privileges and Immunities Clause of the Fourteenth Amendment.

4. Drueding, Id., remains the law.

I.

The relief requested by Appellants in their original Complaint, i.e., the ability to vote in the Presidential Election of 1968, cannot now be granted. Further, the Appellants have now fulfilled the then-existent six-month residency requirement of the State of Colorado, and are therefore now fully eligible to vote in the next Presidential Election in 1972. Finally, the six-month residency requirement has recently been amended to two months. C.R.S. 49-24-1, as amended (April 23, 1969).

Mills v. Green, 159 U.S. 651 (1895) aptly summed up the law with regard to mootness, and under its authority, this case is clearly moot. Moore v. Ogilvie, 394 U.S. 814 (1969), relied upon by Appellants, is not applicable to the instant case because "the problem" is not "capable of repetition" since Colorado has amended their statute down to two months. This Court has established practical safeguards and restrictions of long standing which clearly delineate its consideration of constitutional questions. These principles were clearly set forth by Mr. Justice Brandeis, concurring, in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, at page 346, et.seq. (1936).

cussed supra, is, in and of itself, dispositive of the issue

Going further, however, utilizing the traditional "Equal Protection" test, it is seen that a rational relationship exists between permissible state objectives and the two-month voting residency requirement. These permissible state objectives (legitimate state interests) are:

1. To preserve the purity of elections.
   a. To identify the voter.
   b. To prevent double-voting (voting in more than one state).
   c. To prevent a "colonization" of voters.
   d. All of the above to prevent voting fraud.
2. To insure that the voter is, in fact, a member of the state community, and as such has an interest in all matters (including federal issues) pertaining to its government (both state and federal).
3. Administrative reasons.
   a. A "new resident" voter must be registered in advance of the election as are all other qualified voters in Colorado.
   b. The number of: polling places, voting judges,

> precinct clerks, etc. are dependent upon an advance registration of voters including "new resident" voters. It takes time to translate "raw" registration data down to the various precinct requirements.

Concrete examples are pointed out in the Argument whereby these legitimate state interests are served by the two-month voting residency requirement.

It is clear that "Election Day" is not a sufficient time period for a state to fulfill these aforesaid objectives. Now, if one day, or a portion thereof, is not a sufficient time period to accomplish these legitimate state interests, then how can one say that two months is an unreasonable period of time.

Appellees contend that the "compelling state interest" test has never been applied to the fundamental state voting requirements of residency, requisite age, and United States citizenship. See: Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969). A close reading of both these cases lends to the conclusion that the "compelling state interest" test was applied only to voter qualifications imposed over and above the fundamental requirements of residency, requisite age, and United States

Nevertheless, Appellees contend that the permissible state objectives set forth, supra, are, in fact, "compelling state interests". These compelling state interests when weighed against the brevity of the two-month residence requirement certainly satisfy the reasonableness requirements of the Equal Protection Clause of the Fourteenth Amendment.

Moving to the Privileges and Immunities Clause, there is not one case that has ever held that the right to vote for President and Vice-President is a "privilege and immunity" of federal citizenship. On the contrary, the cases hold that the right to vote for President and Vice-President is an attribute of state citizenship. Drueding v. Devlin, cited supra; Gray v. Sanders, cited supra; Pope v. Williams, cited supra; Minor v. Happersett, cited supra. Since there is no federal right to vote for President and Vice-President, then it becomes patently clear that Colorado's two-month voting residency requirement cannot "abridge" a non-existent right.

Appellants' use of the "welfare residency cases" to support their "Privileges and Immunities" argument is inappropriate. Colorado's voting residency requirement in no way violates Appellants' right to travel. The welfare

following reasons:

1. The Colorado voting statute does not create "a chilling effect on the right to travel."

2. One of the admitted purposes of the welfare residency requirements was to discourage entry of the poor into the respective states. Clearly there is no such purpose with respect to Colorado's two-month voting residency requirement.

3. Shapiro v. Thompson, Id., affirmed Thompson v. Shapiro, 270 F.Supp. 331 (D.Conn. 1967). That case, below, aptly distinguished welfare residency from voting residency by quoting Carrington v. Rash, 380 U.S. 89, at 96 (1965):

> "Texas is free to take reasonable and adequate steps * * * to see that all applicants for the vote actually fulfill the requirements of bona-fide residence." 270 F.Supp. at 338.

4. Finally, Mr. Justice Brennan, writing for the majority, at 394 U.S. 638, Fn.21, declares that, Shapiro, implies no view as to the validity of state residence requirements determining the eligibility to vote.

Immunities" argument to show a violation thereof by Colorado's two-month voting residency requirement None of Appellants' federal "privileges and immunities" (rights) have been violated by the Colorado statute.

IV.

As discussed supra, Drueding v. Devlin, cited supra, remains the law as to the questions presented in the instant case None of the cases decided since Drueding in any way mollify its impact. In the Argument (Part IV-A) of this brief, every case cited by Appellants since Drueding is discussed to graphically illustrate that Drueding remains the law. Other cases decided subsequent to Drueding, affirming the Drueding rationale, are also discussed in the Argument (Part IV-B).

Drueding is therefore the law, and is dispositive of the merits in the instant case Additional authorities cited and reason, as outlined in the Argument, buttress the conclusion that the Colorado statute is not in violation of the Constitution of the United States

ARGUMENT

I THERE IS NOW NO ACTUAL CONTROVERSY INVOLVING REAL AND SUBSTANTIAL

RIGHTS BETWEEN THE PARTIES HERETO THE APPEAL SHOULD THEREFORE BE DISMISSED

The Appellants in their Complaint (Appendix, pages 13-14) prayed for: (1) A Writ of Mandamus to compel Appellees, as election officials, to register Appellants "to vote as a qualified elector for the office of President and Vice-President in the forthcoming National Election;" (2) An Injunction restraining the enforcement of the six-month residency requirement "to vote in the National Election for the Office of President and Vice-President;" or, in the alternative (3) Permit "to vote in the forthcoming National Election on a conditional basis, so that should either party choose to appeal to the Supreme Court of the United States * * * the relief sought by Appellants would not become moot." (Emphasis supplied.) The permit to vote on a conditional basis was denied. The relief, therefore, "sought by Appellants," has become moot.

Obviously, the relief requested by Appellants cannot now be granted. The same otherwise would be ineffective and futile. And, Appellants in their Complaint, supra, so understood. Since there is now no actual controversy involving real and substantial rights between the parties hereto and no subject matter upon which the judgment of this Court can operate, the appeal should, therefore, be dismissed.

This Court, as early as Mills v. Green, 159 U S 651, at Page 653 (1895), stated:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." (Emphasis supplied.)

See also Oil Workers Union v. Missouri, 361 U S 363, 367 (1960); Poe v. Ullman, 367 U.S. 497, 504 (1961).

The issues before the Court are moot upon the further grounds: (1) That the Appellants have now fulfilled the six-month residency requirement; and, (2) That the six-month residency requirement has, by recent legislative enactment, House Bill 1214 (April 23, 1969), been amended to two months.

In passing, suffice it to say that had the two-month residency requirement been in effect prior to the November, 1968, Presidential and Vice-Presidential election, Appellants would have been eligible to vote in that election. Further, on December 15, 1968, the Appellants had met the old six-month residency requirement, thus becoming eligible to vote in succeeding Presidential elections.

The Appellants in anticipation of the "mootness" argument have, on Page 16 of their Brief, in effect conceded the question but argue that "the problems imposed by state residence requirements will continue to plague future elections, and the question should therefore be decided by this Court for the guidance of the states and courts below that may face this problem in the future." (Emphasis supplied.)

Appellants cite Moore v. Ogilvie, 394 U.S. 814 (1969), as giving the Court the power to make such a determination in the instant case. To begin with,

Moore, supra, commenced as a suit in declaratory (and injunctive) relief, pursuant to 28 U.S.C., Sections 2201 and 2202. Here, on the other hand, Appellants made it clear in Paragraph 1 of their Amended Complaint that they were proceeding under 28 U.S.C., Section I343(3) - not Sections 2201 and 2202. (See Page 10 of the Appendix.) Declaratory relief, therefore, cannot be granted and Moore, supra, is inapplicable.

Further, in Moore, supra, the statute under attack had not been changed in over thirty-four years. There this Court stated:

> "The problem (of nominating electors in federal elections) is therefore 'capable of repetition, yet evading review' * * * as long as Illinois maintains her present system as she has done since 1935." (Emphasis supplied.)

Here, the statute under attack has, since the commencement of this suit, been amended from a six-month residency requirement in Federal elections to two months. C.R.S. (1963), 49-24-1, as amended, now provides:

> "Eligibility of new residents to vote. Any citizen of the United States who shall have attained the age of twenty-one

> years, who shall have resided, next preceding the election at which he offers to vote, in this state and in the county or city and county not less than two months, and in the precinct not less than fifteen days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for presidential and vice-presidential electors."

The "problem" therefore is incapable of repetition (The instant case is also distinguishable from Gray v. Sanders, 372 U.S. 368 [1963], cited by Appellants, for the same reason.)

This Court has established practical safeguards and restrictions of long standing which clearly delineate its consideration of constitutional questions. These were enumerated in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, at Page 346, et.seq., (1936), in a famous concurring opinion by Mr. Justice Brandeis:

> "1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding * * * Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345, * * *

> whether a construction of the statute is fairly possible by which the question may be avoided.' Crowell v. Benson, 285 U.S. 22, 62."

It is clear, in applying the above principles, that there remains for this Court no actual matters in controversy essential to the decision of the case now before it. To express an opinion upon the merits of Appellants' contentions would be to ignore the basic limitations upon the duties and functions of this Court, and to disregard principles of judicial review long established and repeatedly followed.

II. THE CONSTITUTIONALITY OF THE OLD SIX-MONTH RESIDENCY REQUIREMENT IS NOT IN ISSUE.

On the merits, Appellants have based their arguments and framed their issues on the old six-month residency requirement. It is their contention that "There are numerous other states with residence requirements still six months or longer, so the question presented here still affects millions of voters." (Page 17, Appellants' Brief.)

Pending this appeal and subsequent to the lower court's determination, the six-month residency requirement was amended to two months. It is clear that the judgment of a lower court, regardless

of its correctness or incorrectness when entered, must be given appellate consideration, if at all, in view of the amendment. Carpenter v. Wabash Ry., 309 U.S. 23, 26-27 (1940). See also: Hines v. Davidowitz, 312 U.S. 52 (1941).

Accordingly, the Appellees will hereinafter discuss the merits in light of the two-month residency requirement.

III. THE TWO-MONTH RESIDENCY REQUIREMENT OF COLORADO REVISED STATUTES 1963, SECTION 49-24-1, AS AMENDED, IS NOT IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

To begin with, it is to be noted that the constitutionality of C.R.S. (1963), 49-24-1, as amended, is supported by a presumption of validity (Hall of Distributors v. Bowers, 139 F.Supp. 400, 404 [D.C. Ohio, 1956]), and the burden of establishing its unconstitutionality rests upon the Appellants (Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 [1935]). The authority to declare a statute void is of such a delicate and awful nature that the Court will never resort to that authority except in a clear and urgent case. (Calder v. Bull, 3 Dall. [U.S.] 386, 1 L.Ed. 648).

It is fundamental that the primary power to establish voter qualifications rests with the States (Pope v. Williams, 193 U.S. 621 [1904]); that such power

applies to federal as well as state elections (U.S. Const. Art. II, § 1; Gray v. Sanders, 372 U.S. 368 [1963]); that "the states have * * * broad powers to determine the conditions under which the right of suffrage may be exercised" (Lassiter v. Northampton County Elections Bd., 360 U.S. 45 [1959]); and, that the States have "unquestioned power to impose reasonable residence restrictions on the availability of the ballot" (Carrington v. Rash, 380 U.S. 89 [1965]; Lassiter v. Northampton County Elections Bd., cited supra). (Emphasis supplied.)

Specifically, in regard to the case at bar, Article II, Section 1, and the Twelfth Amendment, of the Constitution of the United States, provide that the President and the Vice-President of the United States shall be selected by electors chosen from each state, who shall be appointed "in such manner as the Legislature thereof may direct." (Emphasis supplied.)

The Legislature of the State of Colorado, pursuant to the aforesaid Constitutional mandate, enacted C.R.S. (1963), 49-24-1, as amended, providing for a two-month State residence requirement for otherwise qualified voters in United States Presidential and Vice-Presidential elections.

Appellants contend that the aforesaid residency requirement is violative

of the "Equal Protection" and "Privileges and Immunities" clauses of the Fourteenth Amendment to the United States Constitution. Appellants' contention clearly is without merit.

A. THE COLORADO RESIDENCY REQUIREMENT IS NOT VIOLATIVE OF THE "EQUAL PROTECTION CLAUSE" OF THE FOURTEENTH AMENDMENT.

Contrary to popular belief, it is not the citizens of the United States, per se, that elect the President and the Vice-President. It is the States - each acting individually through its electoral college. And, it is the "electors" of the individual states, not the voters therein, that determine for whom the state will cast its electoral votes. It is only logical, therefore, that the individual states have the power to determine the mode of selection of electors in their respective jurisdictions as well as the qualifications of voters therein, so long as the exercise of that power is reasonable.

This Court has stated in McPherson v. Blacker, 146 U.S. 1, at Page 27 (1892):

> "The (Federal) Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket,

> nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

Apparently Appellants concede that the States have the power to impose reasonable residence requirements on voters in Presidential and Vice-Presidential elections. (To argue otherwise, of course, would be to disregard the very instrument upon which the Appellants rely in asserting their rights - the Constitution of the United States.)

The only real issue for this Court to decide, therefore, is whether the Colorado Statute which requires residence in the State for two months, before an otherwise qualified voter may vote, is so unreasonable as to amount to a prohibited discrimination under the Equal Protection Clause of the Fourteenth Amendment.

This Court answered the question in the negative in the leading case of Drueding v. Devlin, 234 F.Supp. 721 (D.Md., 1964), aff'd per curiam, 380 U.S. 125 (1965). And, Appellees contend that the aforesaid decision is controlling and determinative of the issues presented in the instant case.

Here, the Court is asked to rule upon the constitutionality of a two-month residency requirement. In Drueding v. Devlin, supra, this Court upheld the State of Maryland's one-year residency requirement. Save for the names, dates, places and length of residency requirement, the facts in the two cases are identical. If this Court upheld the one-year residency requirement, and the shortness thereof is the criteria for determining reasonableness, then clearly, on the basis of logic and under the doctrine of Stare Decisis, this Court should likewise uphold Colorado's two-month (1/6 of a year) residence requirement.

The Court in Drueding reaffirmed the proposition that the States have broad powers in determining voter qualifications, including residency requirements, in the election of President and Vice-President of the United States. In quoting from this Court's opinion in McGowan v. Maryland, 366 U.S. 420, 425 (1961), the Court therein at page 724 of 234 F.Supp., stated:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on

> grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."

Further, it is to be noted that the Court in Drueding held that the issues involved in the congressional re-districting cases and the legislative reapportionment cases (some of which have been cited by Appellants in the instant case) were not germane to the voter residency issue. Appellees herein likewise contend that such decisions have no applicability to the issues in the instant case. (This is so primarily because of the special provisions of Article II, Section 1, of the United States Constitution. And, as the Court so stated at page 725 of 234 F.Supp.: "it may be noted that the Supreme Court declined to intervene in such cases until it was convinced that there was little hope that the several State legislatures would take remedial action.") The Colorado Legislature has, of course, taken such remedial action by lowering the voting residency requirement to two months.

Finally, the Court in Drueding, by way of dictum, commended those states (such as Colorado) which had shortened their respective state residency requirements for Presidential and Vice-Presidential

elections. In concluding its opinion, the Court held:

> "The Court cannot say that the requirements of the Maryland Constitution and statutes in question here are so unreasonable that they amount to an irrational or unreasonable discrimination. The motion to dismiss must therefore be granted."

In upholding the State of New York's ninety-day state residency requirement for voters in Presidential and Vice-Presidential elections, the Court of Appeals of that State in Van Berkel v. Power, 16 N.Y.2d 41, 261 N.Y.S.2d 876, 209 N.E.2d 539, at page 511 (1965), stated:

> "New York State having not irrationally concluded that a citizen should be such for at least 90 days before he votes, has not violated any of the prohibitions of the Federal Constitution nor has it entered into a pre-empted field. Setting voter qualifications is still the business of the States." (Emphasis supplied.)

Drueding was cited as authority for this decision.

In the case at bar, the Colorado

Legislature has likewise "not irrationally concluded" the necessity for the existence of a two-month residency requirement for voters in Presidential and Vice-Presidential elections. Thus as to "reasonableness," the Appellants in order to succeed herein must show that no reasonable basis whatsoever existed for the two-month residency requirement.

And,

> "The fact that the Court differs with the Legislature in its views of public policy or holds views inconsistent with the propriety of legislation, affords no ground for judicial interference therewith, unless the act is unmistakably and palpably in excess of legislative power; the Legislature being primarily the judge of necessity of enactments respective of local conditions." (Emphasis supplied.) (Hall of Distributors v. Bowers, supra, at page 404 of 139 F. Supp.)

The Colorado Legislature has investigated and found the existence of conditions indicating the necessity of a two-month state residency requirement for voters in national elections. The prime objectives of Colorado's state residency requirements have been enumerated

by the Colorado Supreme Court as follows: (1) To preserve the purity of elections (Mauff v. People, 52 Colo. 62, 123 P. 101 [1912]); and, (2) To prevent the control of state affairs by persons who have no pecuniary interest in them (Merrill v. Shearston, 73 Colo. 230, 214 P. 540 [1923]).

In Drueding v. Devlin, supra, the objectives of statutory residency provisions were noted thusly: (1) To identify the voter and to protect against fraud; and, (2) to insure that the voter will in fact become a member of the community, and as such have a common interest in all matters pertaining to its government.

These objectives have otherwise been stated in 29 C.J.S., Elections, Section 19 and 19(b), commencing at page 69 as follows:

> "The object of prescribing residence as a qualification for the exercise of the elective franchise is not only to identify voters and to prevent fraud, but also to assure that each voter will become in fact a member of his community and take an interest in its government. * * * (§19)
>
> "The purpose of a constitutional or statutory requirement that a voter must be an actual bona-fide resident of the place

where he offers to vote is to provide a term of educational probation and to prevent a colonization of voters." (§19[b]).

It is Appellants' contention that Colorado's two-month residency requirement,

"is an arbitrary and irrational classification serving no legitimate state purpose or end. * * * Colorado's waiting period requirement, when voting for President and Vice-President, does not serve any legitimate state interests whatsoever. * * *" (Appellant's Brief, page 9.)

On page 10 of their Brief, Appellants further argue that,

"(a) Residence <u>in Colorado</u> is not relevant to a voter's being a member of the community to be governed by the one to be elected, for such 'community' in a Presidential election is the national community, not a state community * * * (b) Residence <u>in Colorado</u> does not make a voter any more qualified to vote for President, nor any more familiar with the candidates and issues involved * * *."

Sharp issue is taken with these contentions. Constitutionally, the states, not the individual voters, elect the President. The proof of this is found in our Electoral College system whereby a traditionally close vote in a state such as California, for example, results in the Presidential candidate receiving a "bare" majority of the popular vote taking all of the electoral votes of our most populous state. Are not all those voters who voted for the minority candidate in California disenfranchised by the electoral college system set up by our federal Constitution? Clearly so, and this is the heart of the matter. It is the States and not the individual citizens who elect the President. If this concept is repugnant to our present-day views of democracy, then the reform lies in the abolition of the Electoral College system by Constitutional Amendment which must be ratified by three-fourths of the States. Such reform cannot arbitrarily come from this Court because of our Constitutional framework of separation of powers.

Finally, each state has unique problems which are affected by the domestic platform of a particular Presidential candidate. Some problems unique to the State of Colorado, for example, which may not be shared by other states, are: reclamation, conservation, oil-shale utilization, oil depletion allowance, atomic energy experiments, storage of

U.S. Army poisonous gas, status of federal lands, federal land management, national forests, interstate water compacts, etc. Is it not a legitimate State interest to insure to some small degree (i.e., a two-month requirement of residency within the State) that a new resident therein become familiar with these problems? Should not the resident Colorado voter have these interests in mind when casting his vote for President and Vice-President - particularly since his vote could determine how all of Colorado's electoral votes might be cast? Both questions clearly must be answered in the affirmative.

Appellants apparently contend there should be no residency requirements whatsoever. Even administratively speaking this, of course, would be impossible. The voting process in Colorado requires prior registration, sending of registration lists to the precincts, setting up voting machines (number to correspond to precinct registration), planning the number of polling places to be assigned to a given precinct based upon registration, etc.

Assume, arguendo, there are no state voting residency requirements. It is Presidential Election Day, 1972. A voter is a bona-fide resident of the State of New York. He votes in his local Manhattan precinct. Thereupon, he catches a train to Newark, New Jersey; goes to a Newark precinct; declares himself a resident of New Jersey; and, votes again

for the candidate of his choice. The enterprising voter then catches a train bound for Greenwich, Connecticut. He proceeds to a Greenwich precinct, declares himself a Connecticut resident, and votes once again for the same candidate. All three states will record his vote that day and the respective electors in all three states will be affected.

An extreme situation has been depicted to illustrate one compelling point. States control the voting process. There is no Federal registration to vote. This onerous responsibility requires corresponding authority to properly discharge that responsibility. The right to vote springs from one body-politic - and one only - the State wherein one legally resides. It is apparent that no residency requirement whatsoever could result in a disastrous Presidential election as measured by standards of fairness and equality. Now, if the Election Day is not a sufficient time period for a state determining the legitimate residence of its voters, then how can one say that two months is an unreasonable period of time for a state to determine the legitimacy of the residence of a "new resident voter."

The State of Colorado, therefore, has provided for a two-month residence requirement for "new resident voters" in furtherance of legitimate and compelling state interests. These state interests

when weighed against the brevity of the two-month residence requirement certainly satisfy the reasonableness requirements of the Equal Protection Clause of the Fourteenth Amendment.

B. THE COLORADO VOTING RESIDENCY REQUIREMENT IS NOT VIOLATIVE OF THE "PRIVILEGES AND IMMUNITIES CLAUSE" OF THE FOURTEENTH AMENDMENT.

There is not one case that has ever held that the right to vote for President and Vice-President is a "privilege and immunity" of federal citizenship. On the contrary, the cases hold that the right to vote for President and Vice-President is an attribute of state citizenship. Minor v. Happersett, 21 Wall. 162, 177, 22 L.Ed. 627; Pope v. Williams, 193 U.S. 621; Gray v. Sanders, 372 U.S. 368; Drueding v. Devlin, 234 F.Supp. 721 (D.Md., 1964), aff'd per curiam, 380 U.S. 125 (1965).

In Pope v. Williams, supra, this Court aptly stated the law:

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States, Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627. It may not be refused on account of race,

> color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution." 193 U.S. 621, at 632. (Emphasis supplied.)

This remains the law. Appellants cite United States v. Classic, 313 U.S. 299 (1941), to the effect that the right to vote for federal Congressmen is clearly a right of federal citizenship. This is undisputed, but it must be pointed out that Classic clearly states that this right springs from Article I, Sections 2 and 4 (Elections for Senators and Representatives) of the Constitution of the United States and not from the Privileges and Immunities Clause of the Fourteenth Amendment. Id. at 315. It is submitted therefore that Appellants' cite of Classic in conjunction with their "Privileges and Immunities" argument is inappropriate. Likewise with Ex Parte Yarborough, 110 U.S. 651 (1884), Id. at 663. Yarborough, of course, also cited the Fifteenth Amendment as an ancillary

foundation for the rights enunciated therein. Id. at 664, 665. Clearly, the Fifteenth Amendment is not relevant to Appellants' position or contentions.

The right to vote for federal Senators and Representatives, therefore, springs from the States, themselves, and the Constitution of the United States, Article 1, Sections 2 and 4, the Fifteenth Amendment thereto, and the Seventeenth Amendment thereto. It springs therefore from both State and Federal citizenship. There is no legal support, however, for Appellants' contention that it springs from the "Privileges and Immunities Clause" of the Fourteenth Amendment. Thus, there is no support, in this regard, for Appellants' contention that the right to vote for President springs from the "Privileges and Immunities Clause". A fortiori, since there is nothing comparable to the Seventeenth Amendment (providing for Popular Election of U.S. Senators) or Article I, Section 2 (providing for Popular Election of U.S. Representatives), with respect to the election of the President and Vice-President, then it must be concluded under Article II, Section 1, that there is no federal right, per se, to vote for President and Vice-President. The right to vote for President and Vice-President, as distinguished from the right to vote for U.S. Senators and U.S. Representatives, therefore, springs from State citizenship, alone. Since there is no federal right (which includes all federal

privileges and immunities) to vote for President and Vice-President, then it becomes patently clear that Colorado's two-month voting residency requirement for President and Vice-President cannot abridge a non-existent right, privilege, or immunity.

Appellants' attempt to use the "welfare residency cases" in their "Privileges and Immunities" argument is likewise inappropriate as discussed, infra, in IV - A-2.

In conclusion, there is nothing contained in Appellants' "Privileges and Immunities" argument to show a violation thereof by Colorado's two-month voting residency requirement. Appellants have shown none of their federal "privileges and immunities" (rights) to have been violated by said Colorado statute.

IV. DRUEDING REMAINS THE LAW.

A. Drueding v. Devlin, cited supra, remains the law as to the questions presented in this case as there has been nothing to mollify its impact since it was affirmed per curiam by this Court in 1965. This is so despite Appellants' steadfast contentions to the contrary.

1 As to the "equal protection" argument:

As to this argument, Appellants cite

only six cases decided since Drueding, i.e.:

1) Harper v. Virginia Board of Elections, 383 U.S. 663 (1966);

2) Katzenbach v. Morgan, 384 U.S. 641 (1966);

3) Williams v. Rhodes, 393 U.S. 23 (1968);

4) Moore v. Ogilvie, 394 U.S. 814 (1969);

5) Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969);

6) Cipriano v. City of Houma, 395 U.S. 701 (1969).

All can be clearly distinguished.

First, Harper, itself, states, by way of dictum, that the states have the power to fix voter qualifications within the constitutional framework. (Emphasis supplied). It quotes Lassiter v. Northampton Election Board, 360 U.S. 45, 51 (1959), to this effect at 383 U.S. 665. Also, the Court in Harper, states:

> "Thus without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot (see Pope v. Williams, 193 U.S.

621) * * *" 383 U.S. 663, at 666.

Finally, Harper deals with a subject clearly distinguishable from state residence requirements, i.e., the poll tax. Harper, therefore, is clearly inapplicable to the instant case.

Second, Katzenbach v. Morgan, 384 U.S. 641 (1966) is irrelevant to the disposition of the instant case because Appellants cite it repeatedly to merely state the obvious, i.e., a state (voting) statute is invalid if it violates the Equal Protection Clause. This is elementary, but we have shown why the Colorado two-month residency requirement does not violate the Equal Protection Clause. Appellants make no other use of Katzenbach v. Morgan, cited supra.

Third, Williams v. Rhodes, 393 U.S. 23 (1968), can be clearly distinguished because it applies to a subject area wholly separate and apart, i.e., political parties being listed on a Presidential ballot. It is interesting to note that this Court stated in its majority opinion:

> "And as we have said, the State is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors." Id. at 34.

Fourth, Moore v. Ogilvie, 394 U.S. 814 (1969), has already been shown to be clearly inapplicable to the instant case as outlined on page 5 of our brief.

Fifth, Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) can be clearly distinguished because the Court states:

> "At the outset, it is important to note what is not at issue in this case. The requirements of §2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged. Appellant agrees that the States have the power to impose reasonable citizenship, age and residency requirements on the availability of the ballot. Cf. Carrington v. Rash, 380 U.S. 89, 91 (1965); Pope v. Williams, 193 U.S. 621 (1904)." (Emphasis supplied.)

Mr. Justice Stewart, with whom Mr. Justice Black and Mr. Justice Harlan joined in dissent, stated:

> "Indeed, the Appellant explicitly concedes, as he

must, the validity of voting requirements relating to residence, literacy, and age." (Emphasis supplied."

In fact, a close reading of this case lends to the conclusion that the "compelling state interest test" is not applicable to "rational" state residency requirements.

Sixth, Cipriano v. City of Houma, 395 U.S. 701 (1969), also deals with a limited purpose election in which the appellant did not challenge any other voter qualification regulations including residency. (Footnote 4-Id.) In dealing with the denial of the right to vote to otherwise qualified voters (including being qualified as to residency), this case is clearly distinguishable. The "compelling state interest test" was applied only to a denial of the right to vote after the voter had already qualified as to residency. The "compelling state interest" test, therefore, has never been applied to the fundamental state voting requirements of residency, age, and United States citizenship.

In conclusion, there is nothing contained in Appellants' "Equal Protection" argument to lessen the controlling force of Drueding in the instant case.

2. As to the "Privileges and Immunities" argument:

Appellants cite only two cases decided since Drueding, i.e., United States v. Guest, 383 U.S. 745 (1966); and Shapiro v. Thompson, 394 U.S. 618 (1969).

First, United States v. Guest, cited supra, is used repeatedly by Appellants for one purpose, and one purpose only, i.e., to establish the "right to interstate travel". This proposition is elementary, fundamental, and uncontested. Guest says nothing about the "de novo bootstrapping tie-in" which Appellants attempt in their brief, i.e., to say that because there is a right to travel there is also an automatic right to vote for President without any showing of state residence whatsoever. Guest, therefore, is authority for nothing comprising the gist of Appellants' argument.

Lastly, Shapiro v. Thompson, 394 U.S. 618 (1969), is relied upon heavily by Appellants in their Privileges and Immunities Argument.

Appellants contend that anything that serves to penalize the exercise of the right to travel is unconstitutional unless a compelling state interest is served, citing Shapiro v. Thompson, Id. We accept this as the holding of Shapiro. However, it is not applicable to the instant case for the following reasons:

1. We contend that Colorado's

voting residency requirement in no way violates Appellants' right to travel. Assume Appellant, being a graduate of an accredited law school, had to establish residency for a given period of time before taking the Colorado Bar Examination yet he wanted very much to live and practice his chosen profession in Colorado. Is the necessity of establishing residence for a given period of time before taking the Colorado Bar Examination an imposition on his right to travel to and establish residence in Colorado? The answer is obviously, NO, in that he is free to come to Colorado, but this does not mean that he is, ipso facto, immune from Colorado statutes involving residency prerequisites in certain selected areas. The right to vote in Colorado, therefore, is quite collateral to the right to travel to Colorado. Has Appellant, therefore, shown any nexus between the right to travel and the fact that he could not qualify to vote for President under Colorado's residency requirement? The answer is an unequivocal NO. Further, Colorado did not infringe his right to travel and establish residence here in any way, whatsoever. This is quite distinguishable from "a chilling effect on the right to travel" as enunciated by the majority of the Court in Shapiro.

2 One of the avowed purposes of the state residency requirements in the Shapiro cases was to discourage entry of the poor into the respective states.

> "We do not doubt that the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance." 394 U.S. 618, 629.

Clearly there is no such purpose with respect to Colorado's two-month voting residency requirement. Colorado is not trying to "fence out" anybody with this law nor does it even serve to "fence out" anyone. Realistically, can Appellants show one concrete example of any person being discouraged from establishing residence in Colorado because of the Colorado two-month voting residency requirement? It apparently did not discourage the Appellants, themselves, from establishing residency here in 1968.

The compelling state interests supporting Colorado's two-month voting residency requirement have been set out at length, supra, in Section III. A, - "The Equal Protection Clause". Those compelling state interests are the rationale for our voting law, and are not analagous, in any way, to the States' rationale in the Shapiro cases.

3. Green v. Department of Public Welfare, 270 F.Supp. 173 (D.Del., 1967), cited in Footnote 1 of Shapiro v. Thompson, 394 U.S. 618, 622 as in Accord, specifically distinguishes Drueding, cited supra, in stating:

> "But certainly it takes little logic to conclude that the need for food, clothing and lodging has an aspect of immediacy which differentiates it in kind from the right to vote." 270 F.Supp. 173, at 178.

4. Shapiro v. Thompson, supra, affirmed Thompson v. Shapiro, 270 F.Supp. 331 (D.Conn., 1967), which also specifically distinguished welfare residency from voting residency by quoting Carrington v. Rash, 380 U.S. 89, 96 (1965):

> "Texas is free to take reasonable and adequate steps * * * to see that all applicants for the vote actually fulfill the requirements of bona-fide residence." 270 F.Supp. at 338.

Clearly, Appellants' attempt to analogize voting residency requirements with welfare residency requirements is like trying to compare the proverbial "apples with oranges".

5. Finally, Mr. Justice Brennan at 394 U.S. 638, Fn.21, states:

> "We imply no view of the validity of waiting-period or residence requirements determine eligibility to vote, eligibility for tuition-free education, to obtain a license

> to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the Constitutional right of interstate travel." (Emphasis supplied.)

Shapiro has been shown to be of no support for Appellants' attack on Colorado's two-month voting residency requirement.

In conclusion, there is nothing contained in Appellants' "privileges and immunities" argument to lessen the controlling impact of Drueding on the instant case.

B. Having disposed of Appellants' attacks on Drueding, we now move to the affirmative to show cases that have been decided since Drueding which support it, and, therefore, in turn support Appellees' position.

Van Berkel v. Power, 16 N.Y.2d 41, 261 N.Y.S.2d 876, 209 N.E.2d 539 (1965), is discussed above at page 27 of this brief. The Fourteenth and Fifteenth Amendments do not disable any appropriate governmental body from regulating suffrage where a legitimate state interest exists; the two amendments mean simply that the states and the federal government must exercise their powers so as not to discriminate between

their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. U.S. v. State of Alabama, 252 F.Supp. 95 (1966). The states have broad powers to determine conditions under which the right of suffrage may be exercised. Carrington v. Rash, 380 U.S. 89 (1965). A case that Appellants rely upon, Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), proclaims that the states have the power to fix voter qualifications within the constitutional framework. (Emphasis supplied.)

The Voting Rights Act of 1965, 42 U.S.C. 1971 et.seq. does not in any way strike down reasonable state legislation as to voting qualifications, including residency. The Voting Rights Act of 1965 is only applicable to invidious grounds of state action such as discrimination based on race, creed, or color. Residency is a fundamental positive requirement for voting in an area. Davis v. Gallinghouse, 246 F.Supp. 208 (1965). This case is extremely important because it construed the Voting Rights Act of 1965 with respect to state residency requirements. The U.S. District Court unequivocally upheld the residency requirements of the State of Louisiana by holding:

> "The Court finds that the requirement of proof of residence is reasonable as well as lawful and consonant with human dignity."

Further, the Court stated:

> "The Court finds no support for the argument that documentation of residence comes within the Voting Rights Act ban on tests and devices."

Clearly, therefore, state residency requirements do not come within the prohibitions of the Voting Rights Act of 1965.

In sum, it is readily seen that nothing in the law has changed since the Drueding affirmance by the Supreme Court of the United States in 1965. Drueding is therefore the law and controls the outcome in the instant case. Therefore, it is patently clear that the Colorado residence requirement of two months in order to qualify as a voter for President and Vice-President of the United States is not invidious, is reasonable under the Fourteenth Amendment, and is therefore constitutional.

CONCLUSION

For the foregoing reasons, it is urged that:

1. This appeal should be dismissed for mootness or,

2. If the appeal is decided on the

merits, then the judgment of the court below should be affirmed.

Respectfully submitted,

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